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Supreme Court of the United States

OCTOBER TERM, 1933

CHARLES E. GAY, JR., RECEIVER OF SAVANNAH & ATLANTA RAILWAY,
Petitioner,

vs.

MAJOR RUFF,
Respondent.

No. 663

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit:

BRIEF FOR PETITIONER

ROBERT M. HITCH,
ARCHIBALD B. LOVETT,
Savannah, Georgia,
For Petitioner.

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OCTOBER TERM, 1933

CHARLES E. GAY, JR., RECEIVER OF SAVANNAH & ATLANTA RAILWAY,
Petitioner,
vs.
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Respondent.

No. 663

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit:

BRIEF FOR PETITIONER

Statement of the Case

Major Ruff, respondent, brought suit for damages in a State court in Georgia against Gay, the receiver of the railway, alleging that his son was killed through the negligent operation of one of the railway's trains. It appears from the bill of complaint that the receiver was appointed by the District Court of the United States for the Southern District of Georgia, in the exercise of its equity powers, and continuously since his appointment has been carrying on the business of the railway, including the operation of trains. It was alleged that "while so engaged in operating said rail-

road property as said receiver, the said defendant injured and damaged plaintiff by reason of the facts hereinafter alleged" (R. 1).

The case was removed by the receiver to the District Court of the United States for the Southern District of Georgia, in the appropriate Division, acting under the authority of U. S. Judicial Code §33, as amended (R. 8). Respondent filed a motion to remand, which was overruled, the District Court holding in view of the allegations and the decisions hereinafter referred to that the receiver was "an officer of the courts of the United States," and that the action was "for or on account of an act done under color of his office or in the performance of his duties as such officer" (R. 11; 3 Fed. Supp. 264, 265). Later, the case was dismissed for want of prosecution (R. 17).

On appeal, the judgment of the District Court was reversed by the United States Circuit Court of Appeals for the Fifth Circuit. The appellate court thought that while a receiver appointed by a United States court was an officer of the court, nevertheless Judicial Code §33 as amended applied only to actions and proceedings against the receiver personally, and had no application to cases brought against him in his representative capacity where a money judgment was sought to be recovered that would be paid out of the receivership estate. The dismissal was ordered vacated and direction was given that the case be remanded to the State court (R. 30).

Petitioner in due time applied to this court for a writ of certiorari to review the decision of the Circuit Court of Appeals, and on January 15, 1934 the writ was granted and the case assigned for argument.

Assignments of Error

The assignments of Error in the petition for certiorari are as follows:

> "1. The court erred in reversing the judgment of the district court, and in holding that Judicial Code §33 as amended applies to actions and proceedings brought against a receiver, i. e., an officer of the courts of the United States, only where it is sought to hold him responsible in his own person or property; and the court erred in holding that the section does not apply to cases brought against him in his representative capacity where, in case of a money judgment, it would be payable out of the receivership estate.
>
> "2. The court erred in holding that the section invoked by the receiver was without application to this suit, and that the remand was improperly denied and that the suit was improperly dismissed.
>
> "3. The court erred in reversing the case with directions to set aside the dismissal and to remand the cause to the state court."

Opinions of the Courts Below

The District Court's opinion will be found on pp. 11 to 16 of the record, and is reported in 3 Fed. Supp. 264. The opinion of the Circuit Court of Appeals will be found on pp. 25 to 30 of the record, and is reported in 67 Fed. (2d) 684.

Jurisdiction

The jurisdiction of this court has been invoked under §240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. §347 (a).

Jurisdiction was discussed at some length in the brief filed in support of the petition for certiorari (pp. 10 to 14) and since the writ has been granted the discussion will not be repeated.

Statute Involved

The pertinent language of Judicial Code §33 as amended by the Act of August 23, 1916 is:

> "When any civil suit or criminal prosecution is commenced in any court of a state against . . . any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer . . . said suit . . . may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court. . . ."

28 U. S. C., §76; R. S. §643 as amended.

Question Presented

The question arising on writ of certiorari is whether a suit against a receiver, appointed by a United States Court, in charge of the operation of a railroad, to recover damages from the receivership estate for the alleged negligent acts of his agents operating trains, is removable from a State to a Federal court, under the statute just quoted, or whether the statute applies only to suits or prosecutions brought against the receiver for official conduct where it is sought to hold him responsible in his own person or property.

ARGUMENT

POINT I.

The decision complained of departs from the statute, and is in conflict with prior decisions of this court and other courts.

Heretofore the courts of the country generally have sustained the right of removal by a federal receiver. They followed the statute. Congress made no distinction between cases where judgment was sought against the receiver personally and those where judgment was sought against him in his representative capacity. The Congress is presumed to have said what it meant. If it had intended to authorize any such distinction presumably it would have said so. The court below was unauthorized, either by statute or by earlier decisions of this court and of other courts, to originate any such distinction and thereby amend the statute. *Barnette v. Wells Fargo National Bank*, 270 U. S. 438, 441; *Newell*

v. Byram (C. C. A., 8th), 26 Fed. (2d) 200; *Snider v. Sand Springs Ry.* (C. C. A., 10th), 62 Fed. (2d) 635; *Matarazzo v. Hustis*, 256 Fed. 882, 887; *American Locomotive Co., et al. v. Histed*, 18 Fed. (2d) 656; *Newell v. Byram*, 18 Fed. (2d) 657; *Berens, Jr. v. Byram, et al.*, 26 Fed. (2d) 953; *Elliott v. Wheelock*, 34 Fed. (2d) 213; *Wegman v. Traders' Nat. Bank*, 220 N. Y. S. 476, 129 Misc. Rep. 132.

In the *Barnette* case, the suit was originally brought in the state court against a receiver of a bank in Alaska, holding his appointment under an order from the United States Court, to recover certain money in a bank and certain property charged to have been taken into possession by fraud and duress of the predecessor receiver. In that case it was decided by this court that:

> "Such a suit was removable under §28 of the Judicial Code as supplemented by the amendment of §33 by the Act of August 23, 1916, c. 390, 39 Stat. 532. *Matarazzo v. Hustis*, 256 Fed. 882, 887-9; see *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 603; *Board of Commissioners v. Peirce*, 90 Fed. 764. The alleged right to recover grew out of transactions between the plaintiff and the receivers within the territory of Alaska, with reference to land located in Alaska, in all of which the receivers were acting in virtue of authority conferred on them as officers of the Alaska court. *Rouse v. Hornsby*, 161 U. S. 588, 590."

While there was a dissent in the *Barnette* case, the division among the members of this court was not due to any difference of opinion with respect to the removability of the action. The minority dissented only because, in the absence of a full record, they were unwilling to indulge the presumption that the removal had been obtained under the statute here involved, Judicial Code §33.

The Circuit Court of Appeals in the case at bar attempts to distinguish the *Barnette* case by suggesting that the majority opinion dealt with a purely "suppositious" case, and is, therefore, not binding as authority. It was said, "It can not be determined what the case actually held on the point under discussion here, since it does not appear whether the suit was against the receiver personally or 'against the corporation in his name'." (R. 30). The case can not be put aside so lightly. That the suit was brought against the receiver and others clearly appears from the reports of the case in the lower courts. 277 Fed. 110, 111; 298 Fed. 689. The Wells-Fargo Bank, not in receivership, was joined as a defendant only because the receiver had deposited certain funds in it. It is true it did not affirmatively appear on what ground removal was sought, allowed, and sustained, but the majority opinion clearly shows (pp. 440, 441) that the suit was for the surrender and cancellation of a deed to land and to recover money deposited by a receiver in a bank, joined as a party defendant, which was derived from rents and from a sale of some of

the land. It seems clear from the reported decisions that there was no effort to hold the defendant receiver liable in his own person or property. Whatever money judgment might have been recovered would have been payable out of the receivership estate, or if the funds in bank were not a part of the receivership estate, the limit of the recovery would have been to subject the particular fund in controversy. There can certainly be no presumption that an effort was made to hold the successor receiver personally liable when the reported facts show that all he did was to receive the money from his predecessor receiver, leave it in a bank, and hold certain deeds that were turned over to him by his predecessor.

Moreover, it was the adjudicated duty of this court to examine into the question of jurisdiction of its own motion. *Chicago, Burlington & Quincy Ry. v. Willard*, 220 U. S. 413. Under Judicial Code §37, 28 U. S. C., §80, if it had appeared to the satisfaction of the District Court that jurisdiction was lacking the case should have been dismissed or remanded as the situation required.

In *Matarazzo v. Hustis, supra*, cited apparently with approval by this court in the *Barnette* case, District Judge Ray considered and discarded the same reasoning the Circuit Court of Appeals adopted in the instant case. The citation of that case by this court shows, we think, that the majority opinion was not a purely "suppositious" one. This court even referred to pages 887-

889, where Judge Ray discussed the history of the amendment of August 23, 1916 of §33 of the Judicial Code, which amendment enlarged the class of officers entitled to removal by including "*any* officer of the courts of the United States for or on account of *any* act done under color of his office or in performance of his duties as such officer" and where he concluded by saying:

> "A receiver appointed by the courts of the United States by this amendment was put on the same footing with officers created by statute and (the statute) was enacted because of conflicting decisions as to suits against receivers and their removability."

In *Newell v. Byram*, *supra*, the argument to which Judge Hutcheson yielded in the instant case was advanced but was rejected by the Circuit Court of Appeals for the eighth Circuit, speaking through Judge Sanborn, in the following language:

> "It was the Congress of the United States that prescribed in §33 of the Judicial Code the terms and conditions of the removability of the action in hand. Neither court nor counsel may lawfully add to, subtract from or change those terms or conditions."
>
> *Newell v. Byram*, 26 Fed. (2d) 201.

The Circuit Court of Appeals for the tenth Circuit, in *Snider v. Sand Springs Ry.*, *supra*, allowed removal of a similar case and cited with approval *Newell v. Byram, supra*. We recognize that so far as the reported

decision shows no issue was made as to the right of removal in the *Snider* case. However, if the Circuit Court of Appeals had thought the case improperly removed, even in the absence of a motion to remand, the case would have been sent back to the state court under Judicial Code §37, 28 U. S. C. §80.

The other cases to which we have referred are District Court and State court decisions. Removal was allowed in each of them. No distinction was made upon the ground that removability depended upon how or by whom the judgment should be paid.

There are many other decisions of the United States District Courts to the same effect which have not been printed or published (26 Fed. (2d) 202). See application for mandamus in the matter of L. W. Baldwin and Guy A. Thompson, Trustee, et al., petitioners, now pending in this Court, with Brief in support thereof, and applications of other parties at interest for leave to file briefs in this cause.

The only reported decision of a court of the United States besides this case which has denied the right of removability where the judgment is payable out of the receivership estate is *Slover v. Chicago, M. & St. P. Ry. Co.*, 16 Fed. (2d) 609, decided by District Judge Reeves, of the Western District of Missouri. At first, he was of the opinion that only those cases could be removed where the action sought to hold the receiver personally liable. Later, however, recognizing the binding authority of *Newell v. Byram, supra*, of his

own Circuit Court of Appeals, he reluctantly receded from the position first taken by him and even went so far the other way as to hold that an action by an employee under the Federal Employers' Liability Act against a federal receiver of a railway could be removed from the state court to a court of the United States, because he thought the amendment of 1916 of Judicial Code §33 impliedly repealed inconsistent provisions of the Federal Employers' Liability Act. *Elliott v. Wheelock*, 34 Fed. (2d) 213.

In the court below *Hartman v. Fleming* (Mo.), 264 S. W. 873 (2), 874 and *Knapp v. Byram*, 21 Fed. (2d) 226, were cited as opposing the views expressed in the cases already mentioned. An examination of these cases discloses that in the *Hartman* case the United States District Court dismissed the certiorari and remanded the case. All that the Supreme Court of Missouri held was that the action of the District Court was authoritative and conclusive under the decision of this court in *Missouri Pacific Ry. Co. v. Fitzgerald*, 160 U. S. 556, in which it was held that if the District Court remands a case and the state court thereupon proceeds to final judgment, the action of the District Court is not reviewable on writ of error to such judgment. In the *Knapp* case, a decision by three judges sitting in the District Court, it was merely held that the provision of the Federal Employers' Liability Act as amended (45 U. S. C. §56), denying the right of removal to a federal court of actions arising under the Act and brought in the state court, was not repealed by im-

plication by Judicial Code §33 as amended in 1916, the court thereby differing with District Judge Reeves, who held to the contrary, as stated, in *Elliott v. Wheelock, supra.*

POINT II.

The removal statute being plain, there is no room for construction.

Before the amendment of August 23, 1916 of §33 of the Judicial Code the right of removal was limited to certain revenue officers, persons acting under their authority or under revenue laws or on account of right, title, etc., claimed under such laws, to persons holding property or estate by title derived from any such officer and affecting the validity of revenue laws, and to officers of either house of Congress. By that amendment the same right of removal was given to "*any* officer of the courts of the United States for or on account of *any* act done under color of his office or in the performance of his duties as such officer."

That receivers appointed by a court of the United States are such officers, and that under the bill of complaint here the receiver was carrying out his duties as an officer of the court, is not disputed by the Circuit Court of Appeals. Indeed, the court said this "goes, we think, without saying," (R. 26). The court nevertheless, seeking extrinsic aid for interpretation through congressional reports (H. R. No. 776, 64th Congress, 1st session), concludes that Congress must have meant to grant the right of removal to federal receivers only

when it is sought to bind them in their own person or property. But if so, why didn't the Congress say so?

The legislative purpose, as expressed in clear and unambiguous language in the amendment, was to place "*any* officer of the courts of the United States" in the same class with revenue officers, certain others, and members of Congress, and to grant him the same right of removal those officers theretofore enjoyed for acts done under color of their offices or in the discharge of their official duties.

It is a strange and strained interpretation of the words of the amendment, and amounts to a judicial amendment, to say that the right of removal depends upon who shall pay the judgment. The section was given no such interpretation before the amendment of 1916. It is hardly conceivable that Congress intended some suits against receivers for acts done under color of their offices or in the performance of their official duties might be removed, and other like actions brought against them in the same way might not, dependent only upon the party paying the price for the wrong.

Congress *could* have easily provided in the Act of August 23, 1916, if it had desired, that *not every* civil suit against the officers designated might be removed but *only those* in which the action was brought against the officer *to hold him personally responsible for a wrong*. However, it did *not* limit the kind of suits against those officers which it declared to be subject to removal by certiorari.

The words which the Congress omitted from the statute are as significant as those which it used. Both indicate a clear purpose by the law-making power that the amendatory Act, as applied to federal receivers, should protect the jurisdiction of a coordinate branch of the federal government, to the end that its power to conserve a property for the general good might not be frittered away for particular uses in another jurisdiction.

In the House Report mentioned, the Committee said: "The purpose of the proposed amendment is *to extend the provisions* of §33 *uniformly* to *officers of the courts* of the United States not only in cases arising under the revenue laws but *in all cases*, giving to them the same protection *in all cases* now given to officers acting under the revenue laws and to officers of Congress" (Italics ours). Congress must have thought the court's duty to protect the property it administers was not diminished by its obligation to vigorously protect its officers performing their duties. As much reason to grant removal exists in the one case as in the other.

The amendatory statute gave the benefits of the section not only to receivers but to clerks of court, United States Commissioners and other officers while acting in the performance of their duties; and the enlargement of the class to be granted the right of removal seemed wise to Congress, according to the committee report, not only to provide for a more orderly method of procedure but to prevent the anomalous

condition which then existed, which, according to the committee, "could not be justified upon any line of reasoning," whereby certain officers performing their duty under revenue laws were entitled to removal while some officers engaged in other duties not related to revenue laws were not entitled to the right of removal.

But whatever the committee report may have shown, the language of the amendatory statute is so simple and clear in its terms, aid for interpretation is not needed. If there were ambiguity in the statute, and if the construction placed upon it by the Circuit Court of Appeals were not contrary to its plain terms, as we read it, perhaps the committee report might be of some aid to the court. But the language of the statute is positive and clear, and can not be argued away by attenuated theories of applicability only to some particular kind of case against receivers, thereby excluding others not expressly or by clear inference withdrawn from its operation.

Committee reports "can not be resorted to for the purpose of construing a statute contrary to the natural import of its terms. Their use is to 'solve,' but not to create, an ambiguity.' If the language be clear it is conclusive. There can be no construction where there is nothing to construe." *United States v. Shreveport Grain & E. Co.*, 287 U. S. 77(4), 83. See also *U. S. v. St. Paul & M. Ry. Co.*, 247 U. S. 310, 318; *U. S. v. Fisher*, 2 Cranch. 358; *Merritt v. Welsh*, 104 U. S. 694, 702, 705; *U. S. v. Mo. Pac. R. R.*, 278 U. S. 269; *U.*

S. v. Felt & Tarrant Mfg. Co., 283 U. S. 269, 273; *Old Colony R. R. v. Commr. Int. Revenue*, 284 U. S. 552, 560; *Lynch v. Allworth-Stevens Co.*, 267 U. S. 364, 370; *Board of Lake Co. Commrs. v. Rollins*, 130 U. S. 662, 666-7; *U. S. v. Ewing*, 181 U. S. 140, 149; *Penn. R. R. Co. v. Int. Coal Mining Co.*, 230 U. S. 184, 199; *U. S. v. Lexington Mill & E. Co.*, 232 U. S. 399, 409-10; *U. S. v. First Natl. Bank*, 234 U. S. 245, 258-60; *Mackenzie v. Hare*, 239 U. S. 299, 306; *Caminetti v. U. S.*, 242 U. S. 470, 485; *R. R. Com. v. C. B. & Q.*, 257 U. S. 563, 589; *Standard Fashion Co. v. Margraf-Houston Co.*, 258 U. S. 346, 356; *Mason v. U. S.*, 260 U. S. 545, 554; *Russell Motor Car Co. v. U. S.*, 261 U. S. 514, 522-23; *Commr. of Immigration v. Gottlieb*, 265 U. S. 310, 313; *Van Camp v. American Can Co.*, 278 U. S. 245, 253-4; *Hamilton v. Rathbone*, 175 U. S. 414, 419, 421.

In reaching the conclusion that suits against federal receivers in state courts are removable under Judicial Code §33 only when the proceedings are against the receiver personally and it is sought to hold him responsible in his own person or estate, the Circuit Court of Appeals in this case lays great emphasis on *McNulta v. Lochridge*, 141 U. S. 327, 331-2, in which it was incidentally said that if actions were brought against the receivership generally or against the corporation by name, in the hands of or in the possession of a receiver, without stating the name of the individual, it would more accurately represent the character and status of the defendant, as the receiver stands in the place of the corporation.

The case then under consideration was an action against a receiver for acts of his predecessor, and the court was concerned with the Act of March 3, 1887, c. 373, 24 Stat. 552 (Judicial Code §26, 28 U. S. C. §125), permitting suits to be brought against receivers without previous leave of the court. That statute provides that such receiver may be sued in respect of any act or transaction "of *his* in carrying on the business connected with such property, without the previous leave of the court," and the argument was made that since it was not the act of the particular receiver, of which complaint was made, the action would not lie. This court in discussing that contention said that the possession of the receiver was somewhat analogous to that of a corporation sole with respect to which actions will lie by and against the actual incumbents for causes of action accruing under their predecessors in office. While for some purposes the receiver does stand in the place of the corporation, yet there are cases, i. e., foreclosures of mortgages covering specific property representing only a part of the mortgagor's assets, with equity receiverships, where the receiver represents the corporation only in so far as the mortgaged property extends. It is not accurate to say, therefore, that in all cases a chancery receiver stands in the place of the corporation for all purposes. The *McNulta* case must be considered, of course, in the light of the facts then being considered. It had nothing to do with removal proceedings. The only point for decision was whether or not a successor receiver could be sued for

the wrongs of his predecessor, without previous leave of the court, under the Act of March 3, 1887. The case is not authority for cutting up actions against receivers and putting them in piles for removal purposes according to whether the judgment sought binds the receiver personally or only the receivership estate. No such question was before the court in the *McNulta* case.

The *McNulta* case gives no support for writing into Judicial Code §33, by construction, an exception not made in the Act itself as to the classes of cases against federal receivers, for acts done under color of their offices or in the performance of their duties as such officers, which can be removed from a state to a federal court. To impose such an exception on the statute, we submit, violates its plain terms.

POINT III.

The history of the statute clearly shows that the right of removal has never depended upon how a judgment should be paid.

The Circuit Court of Appeals, making some reference to the history of Judicial Code §33, states that for fifty years the policy of Congress has been to restrict, not to enlarge, federal jurisdiction. The history of this statute goes much farther back than fifty years, and if one traces its evolution it will be found that jurisdiction not only has not been restricted by the several amendments but, on the contrary, has been greatly enlarged.

The origin of the statute as we now have it may be found in the so called Force Bill, the Act of March 2, 1833 (4 Stat. 633), and was brought about by the attitude of South Carolina with respect to certain revenue laws of the United States then in force. Although as early as the Judiciary Act of 1789 (1 Stat. 73) and in later statutes (3 Stat. 195; 3 Stat. 231; 3 Stat. 396), some of which expired at the termination of the War of 1812, others by their own limitations, restricted rights of removal were granted, it was the Act of March 2, 1833 which first contained provisions for the removal of suits into federal courts by certain federal officers on presentation of petitions to the federal court itself, without bond or reference to the amount in controversy. The procedure was almost precisely that which is now provided in Judicial Code §33. The principal difference is that the class of officers entitled to removal by Acts of Congress since 1833 has been considerably enlarged.

In these early statutes the controlling thought was to preserve the supremacy and integrity of the laws of the United States for the enforcement of revenue. Protection to the person or property of the officers was only incidental and secondary.

The Act of March 3, 1863 (12 Stat. 755) gave the right of removal to certain military officers, enlarging the class to whom the privilege was granted. The same may be said of the Act of June 30, 1864, §50 (13 Stat. 218). The Act of July 27, 1868 (15 Stat. 226) further

enlarged the class by extending it to certain corporations organized under the laws of the United States requiring, however, filing of a somewhat different petition and a bond in the state court.

The Act of February 28, 1871 (16 Stat. 433) further enlarged the class entitled to invoke removal, and adopted the procedure set out in the Act of 1833. The purpose of this Act was to carry into effect and enforce the provisions of the Fifteenth Amendment. By the Act of March 3, 1875 (18 Stat. 101) officers of Congress were given the right of removal.

And finally by the Act of August 23, 1916 (39 Stat. 532) the right of removal was made to include *any* officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer.

If the history of the statute is to be considered in determining whether or not the right of removal shall be granted only where the person or property of the officer is to be affected, it will be found that before the Act of 1916 no such effect was ever considered determinative. For example, in suits against Collectors of Internal Revenue, where by statute (12 Stat. 741; 28 U. S. C. §842) if a recovery is had and the court certifies there was probable cause for the Collector's action, etc., the judgment is paid out of the treasury of the United States, the right of removal has been continuously recognized by this court. *Philadelphia v. Collector*, 5 Wall. 720; *Venable v. Richards*, 105 U. S.

636; *Downes v. Bidwell*, 182 U. S. 244, 248. See also *Cincinnati Brewing Co. v. Bellman, Collector*, 102 Fed. 16; *Schafer v. Craft, Collector*, 144 Fed. 907; *Coggill v. Lawrence*, 2 Blatchf. 304, 6 Fed. Cas. No. 2,957; *Field v. Schell*, 4 Blatchf. 435, 9 Fed. Cas. No. 4,771; *Onondaga Salt Co. v. Wilkinson*, 8 Blatchf. 30, 21 Fed. Cas. No. 12,269; *Venable v. Richards*, 1 Hughes, 326, 28 Fed. Cas. No. 16,913.

Similarly, this court has held that a suit against a Collector of Customs in a state court in which it was complained that the Collector's deputy delivered imported goods, on which there was a lien for freight, to the consignee on receipt of the freight charges, without notifying the carrier as required by statute, and seeking to recover the money so received, has been held removable, although obviously the Collector would not have paid the judgment. *Cleveland Etc. R. R. v. McClung*, 119 U. S. 454.

A suit against a Collector of Customs for the proceeds of goods condemned as forfeited for breach of the revenue laws, brought by an informer, is held removable. The proceeds of the goods were not the property of the collector. *Van Zandt v. Montgomery*, 2 Blatchf. 421, 28 Fed. Cas. No. 16,884.

Foreign attachment proceedings in a state court, under which a United States Collector of Customs is sought to be made garnishee with respect to goods of the defendant held for duties, is held removable under

the statute though here again no question of personal liability of the Collector is involved. *Fischer v. Daudistal*, 9 Fed. 145.

Where the owner of certain distilled spirits, in the custody of the Surveyor of Customs, desiring to transfer it into packages other than those in which they were imported, because the original barrels were old, worn and decayed, upon refusal brought suit against the Surveyor praying judgment of the court ordering the defendant to permit the transfer applied for, and also for damages, the case was removed from a state to the United States court under the statute. *Thomas & Son Co. v. Barnett*, 135 Fed. 172.

A summary proceeding by a landlord to recover from a lessee possession of premises used as a bonded warehouse, to which proceeding the Collector of Internal Revenue and the United States storekeeper were made parties defendant, and described as undertenants holding over, has been held removable from the state to the federal court. No personal judgment against the officers was involved. *Gallatin v. Sherman*, 77 Fed. 337.

A suit against a corporation building a court house, to enjoin further construction, was held removable solely because such a corporation was engaged in performing a contract with the Secretary of the Treasury and was a person acting by authority of a revenue officer of the United States, given under color of his

office. There was no prayer for personal judgment against the corporation. *Ward et al. v. Congress Const. Co.*, 99 Fed. 598.

There are many other decisions of lower courts upholding removal under Judicial Code §33, before the amendment of 1916, where no consideration was given to whether the judgment sought affected the person or property of the revenue or other officer. Among them are *Dennistoun v. Draper*, 5 Blatchf. 336, 7 Fed. Cas. 488, No. 3,804; *Wood v. Matthews*, 2 Blatchf. 370, 30 Fed. Cas. 465, No. 17,955. See also *Fisk v. Union Pacific R. R.*, 6 Blatchf. 362, 9 Fed. Cas. No. 4,827.

The policy of the courts has been to give a liberal construction to Judicial Code §33 as amended. Thus in *Maryland v. Soper*, 270 U. S. 9, Judicial Code §33 was held applicable to prohibition agents and their chauffeurs, engaged in a quest for an illicit still; in *Colorado v. Symes*, 286 U. S. 510, 517, also holding a prohibition agent within the protection of the section, this court said "Such measures are to be liberally construed to give full effect to the purposes for which they were enacted"; in *United States v. Lee*, 106 U. S. 196, an action of ejectment, where some of the defendants apparently were tax commissioners who bought the land in for the United States, this court said "No case can arise in a state court, where the interest, the property, the right or the authority of the federal government may come in question, which can not be removed into a court of the United States under existing laws";

and in *Tennessee v. Davis*, 100 U. S. 257, in a criminal case in which it was argued by the state that the removal statute only applied to prosecutions in state courts for offenses under the laws of the United States, this court said that the section authorized "the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a federal officer"; and in *Davis v. South Carolina*, 107 U. S. 597, also a criminal case, where it was argued that the section applied only to an officer appointed or acting by authority of a revenue law of the United States, or persons acting under or by authority of such officer, and, therefore, United States marshals or their deputies or assistants, even when they were engaged in the service of process issued for the arrest of parties accused of violation of the revenue laws of the United States, were not entitled to its protection, this court rejected the argument and held the removal by the marshal of the criminal case from the state to the federal court was authorized, and the statute shielded all who lawfully assisted him in the performance of his official duty.

The Circuit Court of Appeals is somewhat critical of Congress if the statute is to be given the interpretation claimed for it by us. It is said that Judicial Code §33 has no relation generally to removability (R. 27), though by its plain terms that is the only thing with which it is concerned. True, it provides for removal under a different form of procedure, and under different circumstances, from the general removal statute,

as laid down in Judicial Code §28, but it is nonetheless a removal statute. The court seems to think to give it the interpretation contended for by us would in some manner reflect upon Congress; that to so construe it would make an "unsuspected breach in the removal laws by hiding that breach away in a secret place" (R. 28). And the court says it seems "bizarre and fanciful to say that by an amendment of three lines tucked away in a section of the Code related entirely to the removal of suits and transactions against revenue officers, etc., a section having no relation whatever to receivers, nor even generally to removals, it was intended to make a secret breach in the removal laws" (R. 27).

We are quite unable to get this point of view. Minds may differ as to whether Judicial Code §28 or §33 is the more appropriate place for an amendment like this, both sections dealing with removal of causes, but surely neither is a "secret place," and amending either creates "no unsuspected breach" in the removal laws. "This thing was not done in a corner," but after committee hearings and report, and under the white light of full publicity, open debate, and received executive approval.

To our way of thinking, amending §33 was the right way to go about it, for Congress intended to enlarge the class of officers there enumerated to whom the right of removal would be allowed.

POINT IV.

The doctrine of implied repeals is not involved in this case.

The respondent argued in the District Court that to give effect to §33 of the Judicial Code as amended in 1916 under the facts shown here, must result in a repeal by implication of §3 of the Act of March 3, 1887, corrected by the Act of August 13, 1888, now embodied in §66 of the Judicial Code, 28 U. S. C. §125.

The Acts of 1887 and 1888 allow suits against a receiver of property appointed by a Court of the United States, in respect of any act or transaction of his in carrying on the business connected with the property, without the previous leave of the court in which such receiver was appointed, but make the suit subject to the general equity jurisdiction of the court of primary receivership.

The argument of implied repeal was not persuasive with the District Court. The District Judge thought that the Acts of 1887-1888 and the Act of 1916 amending Judicial Code §33 could be harmonized, and the rights granted under both preserved, and pointed out that when removal is allowed it has to be in the approximate neighborhood of the plaintiff, which would not have been true except for the Act of 1887-1888, as prior to that time the suit would have been brought in the court of primary jurisdiction wherein the receiver was appointed; and also the right of a jury trial is preserved. The court said, "If it were intended that

the Act of 1916 should not have effect upon the removability of causes, authorized by the Acts of 1887-1888, Congress would inevitably have used some exception rather than use in substance the same language dealing with the same subject-matter. This view is strengthened because there is still left as the effect of the Acts of 1887-1888 the rights above stated" (R. 15).

The same argument was advanced by respondent in the Circuit Court of Appeals, but went unnoticed in the opinion.

The argument was repeated somewhat more faintly on page 11 of respondent's brief in opposition to the granting of a writ of certiorari in this case.

The whole argument is based upon the theory that the language of Mr. Chief Justice Fuller in *Gableman v. P[illegible]ia R. R. Co.*, (1900) 179 U. S. 335, 338, interpreting §3 of the Acts of 1887-1888, wherein he said that the object of those Acts would be open to be defeated if the receiver could remove the case at his volition, is the equivalent of an express legislative prohibition of removal in the Act of Congress itself. This we challenge.

It will be borne in mind that the *Gableman* case was decided before the Act of August 23, 1916, amending Judicial Code §33, was enacted, and, therefore, could not have dealt with the effect of that Act upon the Acts of 1887-1888.

The principal purpose of enacting the "consent" statute in 1887 and 1888 was to permit filing of suits in either state or federal courts against federal receivers "without the previous leave of the court in which such receiver or manager was appointed" 23 R. C. L. p. 127. It may be also, as suggested in the *Gableman* case, that one of the purposes, in addition to the paramount purpose stated, was to allow the litigation to proceed in the approximate neighborhood of the plaintiff. Another purpose may have been in proper cases to allow a trial by jury. All of these purposes are now preserved under the Act of August 23, 1916.

Mr. Chief Justice Fuller in the *Gableman* case clearly recognized that the primary purpose of the earlier Acts was to abrogate the rule theretofore existing that a federal receiver could not be sued without leave of the court appointing him. As the law then stood, he thought that purpose would be defeated if a receiver could remove the case at his volition. As the law then stood, possibly so—though even in that respect he differed with such eminent judges as Judge Taft and Judge Lurton. *Board of Commissioners v. Peirce*, 90 Fed. 764 (1); *Central Trust Co. v. East Tennessee V. & G. Ry. Co.*, 59 Fed. 523 (3), 528. See also *Tompkins v. MacLeod, et al.*, 96 Fed. 927. But when Congress by the amendment of August 23, 1916 of §33 of the Judicial Code so provided in cases where the receiver was sued on account of any act done under the color of his office or in the performance of his duties as an officer of a federal court, the old rule was modified and the right of removal was created.

We have no quarrel with the principal of law heretofore relied upon by respondent, viz., that repeals by implication are not favored; that if effect can reasonably be given to both statutes, the presumption is the earlier one was intended to be unaffected; and that a special and particular statute affording a remedy for particular and specific cases, comprehensive in its nature as to the subject-matter, is not usually repealed by a general law unless the repeal be express or the implication to that end be irresistible. These principles have been declared over and over again by this court and quite recently in *United States v. Burroughs*, 53 S. Ct. 574, 577, 77 L. Ed. 685 (April 10, 1933).

Our reply is that these principles of law have no application in the case at bar. As we have attempted to point out, both statutes as written may and should be enforced. The field to be occupied by each is not the same. The Act of August 23, 1916 (Judicial Code §33, 28 U. S. C. §76) can and should be given effect in this case and will not result in a repeal by implication of the earlier Acts of 1887 and 1888, as now embodied in Judicial Code §66, 28 U. S. C., §125.

Our next point of difference with respondent's argument is that we do not concede the Act of 1887 as amended in 1888 was a special and particular Act, affording a remedy for particular and specific cases, and comprehensively covering the subject-matter, and that the Act of August 23, 1916 was general in its nature. Neither Act seems more particular or special

or comprehensive than the other. It may be, both are particular and special. It is probably more accurate to say that both Acts are general in their nature, having limited application. The same subject-matter is dealt with in part in both Acts, though the words used are slightly different. By the earlier Act, a receiver may be sued without consent of the court "in respect of any act or transaction of his in carrying on the business connected with such property"; and under the Act of 1916 the suit may be removed by the receiver "for or on account of any act done under color of his office or in the performance of his duties as such officer." If Congress had intended that the Act of 1916 should not have the effect of permitting actions against federal equity receivers to be removed where they were sued for official conduct clearly covered by the language used, certainly some exception expressly so indicating would have been contained in the Act rather than to use substantially the same language dealing with the same subject-matter in both Acts. We do not agree, therefore, that this is a case of a general act repealing an earlier special and particular statute and that to sustain removal in this case necessarily must result in repeal by implication of the earlier act.

And the Circuit Court of Appeals has not held in the case at bar that all suits for damages against receivers are not removable. They say only some of them are not. If we adopt the view of respondent, no suit against a federal receiver—whether binding him personally or only the estate he administers—could be removed under Judicial Code §33.

The suggestion was also made in the lower courts that a receiver of a railroad can not operate it negligently "under color of his office," and that a negligent act is one that is unauthorized and is not an act done "in the performance of his duty as such officer." A similar argument was made in this court and was not convincing in *Cleveland, Etc. Co. v. McClung*, 119 U. S. 454, in the case of a removal of a suit against a Collector of Customs who, it was claimed, acted illegally and beyond his authority under the revenue laws of the United States. The discussion by Mr. Chief Justice Waite, on pp. 460-461, is particularly pertinent. See also discussion by Circuit Judge Sanborn, in *Newell v. Byram*, 26 Fed. (2d) on page 201.

V.

Conclusion

To exclude from the operation of Judicial Code §33, as amended, suits against receivers for damages where the receivership estate is sought to be bound, it seems to us would be not to interpret but to amend the Act of August 23, 1916. It was the Congress of the United States that fixed the conditions and the terms of the removability of the action. By express language, simple and clear, the Act applies to "*any* civil suit" commenced "in *any* court of a state" against "*any* officer of the courts of the United States" and for "*any* act done under color of his office," and it may be removed "at *any* time before the trial or final hearing."

To classify and distinguish between different kinds of suits brought against receivers, admittedly officers of the court, though all are for damages because of acts done under color of their offices or in the performance of their duties as such officers, it seems to us obviously defeats the intent of Congress.

For the foregoing reasons, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed, and the judgment of the District Court upheld.

Respectfully submitted,

ROBERT M. HITCH,
ARCHIBALD B. LOVETT,
Savannah, Georgia,
For Petitioner.